

## **“IT’S GRACE AND FAVOR, IT’S NOT LAW”: EXTRA-LEGAL REGULATION OF FOREIGN FOSTER HOMES IN CHINA**

Anna High\*

*This Article examines the scope, law and norms of foreign-run foster homes caring for children from Chinese state-run orphanages, a previously undocumented social sphere. Based on in-depth field interviews and participant observation, I trace the development and expansion of the sector over the last twenty years, then examine and analyze the various interactions occurring between the foster homes—predominantly run by foreign mission workers—and the Chinese state. It is shown that at the local interface between state officials and the foreign foster homes, unofficial extra-legal norms are frequently more effectual and salient in practice than the official and restrictive rules and policies on charities and orphan welfare. Such extra-legal regulation of the sector has resulted in an experience of, at times, uncertainty and vulnerability on the part of the foreign humanitarian workers in terms of the permissibility and sustainability of their work. Despite this, the sector continues to slowly expand in the shadow of fairly well defined informal rules, with social legitimacy rather than formal legality functioning as the most important determinant of stability in this politically charged field. Finally, I examine the practical ramifications of the extra-legal nature of the foreign foster-home and implications thereof for orphan welfare in China generally. The most notable outcomes of this tentative equilibrium are an absence of collaborative advocacy efforts, and a sense of instability and insecurity on the part of workers in the field. As a result, the ability of this sector of civil society to promote reform and improve the welfare of China’s orphaned children is being unnecessarily stifled.*

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\* Distinguished Scholar-in-Residence and Luce Postdoctoral Fellow, Loyola University Chicago School of Law, BA, LLB, BCL, MPhil, DPhil (Oxon). This paper is based on empirical findings reported in my doctoral thesis, awarded by the University of Oxford Faculty of Law in February 2012. Support for this research was generously provided by the Rhodes Trust, the Mustard Seed Foundation, Johnson Tan, Magdalen College and the Centre for Socio-Legal Studies, University of Oxford.

I.	INTRODUCTION.....	358
II.	BACKGROUND OF FOREIGN-RUN FOSTER HOMES .....	363
	1. <i>Prince of Peace and the Dongjian Homes</i> .....	364
	2. <i>Alternative Care Models</i> .....	368
III.	SOCIO-LEGAL ANALYSIS OF GOVERNMENT OVERSIGHT OF THE SECTOR .....	369
	1. <i>The Limited Role of Formal Laws and Policies: Pathways to Legality</i> .....	370
	2. <i>Extra-Legal Regulation: Pathways to Legitimacy</i> .....	374
	i. Rules of the Game .....	376
	ii. Friends in High Places .....	381
IV.	OPERATIONAL CONSEQUENCES OF THE “ONE EYE OPEN” APPROACH TO FOREIGN FOSTER HOMES.....	389
	1. <i>Capacity</i> .....	389
	2. <i>Financial Practices</i> .....	390
	3. <i>Transparency and Good Governance</i> .....	393
	4. <i>Legality for Legality’s Sake</i> .....	394
V.	DISCUSSION: IMPLICATIONS FOR CHINA’S “LONELY CHILDREN” .....	395
	1. <i>The “Chilling Effect”—Lack of Advocacy</i> .....	395
	2. <i>The “Axe Over the Head”—Challenges for Growth and Continuity</i> .....	396
VI.	CONCLUSION.....	399
VII.	APPENDIX A: PROFILE OF INTERVIEWEES.....	401
VIII.	APPENDIX B: METHODOLOGY NOTES .....	402

## I. INTRODUCTION

Good News Training Centre<sup>1</sup> is located in a small village on the outskirts of a major Chinese metropolis. The seventy-odd children who live at Good News are all blind or visually impaired. They are all formally in the guardianship of various state-run orphanages, but have been brought to live at Good News, on a long-term basis, in order to receive specialist medical care and education. The children attend crèche or school classes, and eat meals together, in a central building, and live with “house parents” in a row of family-sized homes next door. The grounds of Good News are

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<sup>1</sup> For reasons of confidentiality, all identifying names have been changed.

expansive and well-tended, and boast gardening beds, horse stables, a swimming pool, and a gymnasium. There is also a large apartment that houses a steady stream of volunteers, some Chinese but most from overseas, who come to Good News to spend time teaching, caregiving, and training.

Many of the children at Good News are on an adoption waiting list. On my second visit to Good News in 2010, I was privileged to witness an adoption party for Teresa, a fourteen-year-old girl who had lived at Good News since being sent there by her home orphanage some six years earlier. It was Teresa's "gotcha day" (the term is used by adoptive parents to refer to the day on which their child is handed into their care) and she had just met her new American parents for the first time. She told me that she felt so nervous that she couldn't say a word to them. When the party began, the children of Good News formed an honor guard at the doorway into the playroom, waving balloons, blowing whistles and banging toy drums to welcome Teresa and her parents to the party. The new family entered and sat in front of a projector screen showing a poignant slideshow of pictures from Teresa's six years at Good News. Then came a video in which various children said their farewells—"Goodbye, my sister, don't forget about us. We will miss you." Finally, when the emotions of meeting her parents and hearing the messages of love on the video seemed about to overwhelm the teenager, the children came one at a time to kneel in front of her and say a final goodbye in person. The intensity of this rite of transition from one family to another could keenly be felt in the room.

Teresa's gotcha day was a visible example of the significant role that homes such as Good News play in the lives of orphaned and abandoned children across China. Good News was founded by a Christian couple who moved to China from Europe to dedicate their lives to the mission of caring for such "lonely children."<sup>2</sup> The

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<sup>2</sup> See generally Anna High, *China's Orphan Welfare System: Laws, Policies and Filled Gaps*, 8(1) U. PA. E. ASIA L. REV. 126, 131–147 (2013) (discussing the demographics of vulnerable children in China). The Chinese word for orphan is *gu'er*—*er* meaning "child" and *gu* meaning "solitary, isolated, alone." The term better accommodates the various life circumstances of the children resident in China's state and private orphanages and foster homes, many of whom have one or both parents living. It should also be noted that the English term "orphan" is experienced by some as pejorative. For that reason, I try to use the term sparingly, and it is not my intention to define children

home is one of dozens of “foster homes” in China, run by scores of Western expatriates—and an increasing number of Chinese nationals—who want to support the often overwhelmed and underfunded state-run orphanages in their care of disabled and special-needs orphans. During the transitional period following the founding of the People’s Republic of China (PRC), all foreign-run missionary orphanages across China were either closed or taken over by the state.<sup>3</sup> Today, while the government continues to officially monopolize the running of orphanages,<sup>4</sup> this new collaborative model of orphan care has spread through major municipalities and their surrounding townships. Children from state orphanages are fostered to specialist homes in order to receive medical intervention and family-style care, often for years at a time until adoption can be arranged or they age out of the system. The homes range from small-scale operations in which a small number of children are cared for by a single “mother and father” team, to larger homes providing care for hundreds of children with a team of caregivers and an emphasis on emulating, as far as possible, a traditional family environment.

This Article is, to this author’s knowledge, the first in-depth socio-legal account of the legal and extra-legal regulation of this social sphere: the fostering of orphaned children from Chinese state institutions to foreign-run welfare homes, homes that are predominantly run by expatriate Christians. Both foreigners and religious groups have traditionally been regarded with suspicion by Chinese authorities, and their charitable works closely monitored and at times interrupted for political reasons.<sup>5</sup> The involvement of such groups in caring for vulnerable children is yet more politically sensitive due to the fact that such activities draw attention to issues such as child abandonment (and the related controversy of birth planning policies); and shortcomings in the state welfare system—issues on which China has frequently adopted a defensive posture on the international stage. The complex intersection of these

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solely by their orphaned status. The term is used broadly, to refer to children who are no longer cared for by their parents.

<sup>3</sup> Xiaoyuan Shang, *Looking for a Better Way to Care for Children: Cooperation Between the State and Civil Society in China*, 76(2) SOC. SERVS. REV. 203, 205 (2002).

<sup>4</sup> *Id.* at 205; High, *supra* note 2 (discussing grassroots private quasi-legal orphanages that have emerged in response to gaps in state provision of services).

<sup>5</sup> *Civic Freedom Monitor: China*, INT’L CTR. FOR NOT-FOR-PROFIT LAW (Dec. 5, 2016), <http://www.icnl.org/research/monitor/china.html> [<https://perma.cc/R3RB-HFQS>].

various socio-political factors in this area of activity make it a valuable case study through which to understand local state-society relations generally and the Chinese state's regulation of foreign-funded and foreign-operated charitable non-profits specifically.

Two previous sociological studies have touched upon the role of foreign charities in caring for orphaned children in China. First, Catherine Keyser's overview of state and non-state actors caring for Chinese orphans briefly introduces three high-profile foreign non-governmental organizations (NGOs) working closely with state orphanages, two of which are included in the current study.<sup>6</sup> She also discusses lower-profile, unregistered foreign organizations providing foster care directly, and describes the difficulties they face due to their lack of registration.<sup>7</sup> Second, Leslie Wang in *Outsourced Children: Orphanage Care and Adoption in Globalizing China* examines assistance offered by Western humanitarian workers to Chinese state-run orphanages, based on two detailed ethnographic case studies. Wang argues that partnerships between foreigners and state orphanages are taking place in an uncertain political context and are thus highly unstable, leading Wang to question the limits of such transnational collaboration as China continues to globalize.<sup>8</sup> This shifting terrain is likewise referred to by Keyser, who argues that "political, bureaucratic and financial constraints [including] tension over how, and under what circumstances, [international] NGOs can be registered . . . hamper the legalization of . . . NGOs as full players in welfare provision for orphans."<sup>9</sup>

The present study expands and builds on these works by exploring the ambiguous legal status of foreign foster homes in China and the related question of the legal and extra-legal norms that structure this space of order. I begin in Part II by describing the history and current scope of services provided by the foster homes. In Part III, I consider laws and policies on charities and orphan welfare provision in China, which purport to tightly limit and

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<sup>6</sup> Catherine Keyser, *The Role of the State and NGOs in Caring for At-Risk Children: The Case of Orphan Care*, in *STATE AND SOCIETY: RESPONSES TO SOCIAL WELFARE NEEDS IN CHINA* (Jonathan Schwartz & Shawn Shieh eds., 2009).

<sup>7</sup> *Id.*

<sup>8</sup> See generally LESLIE WANG, *OUTSOURCED CHILDREN: ORPHANAGE CARE AND ADOPTION IN GLOBALIZING CHINA* (2016) (exploring the interaction between institutionalized children in China and the country's global rise).

<sup>9</sup> Keyser, *supra* note 6, at 62.

control the role of non-state organizations and individuals in caring for China's lonely children. These formal restrictions belie the significant contribution of this informal, quasi-legal private sector in assisting the state in its care of orphans. I seek to understand, describe, and analyze the extra-legal norms and informal interactions with state actors that define the sector, norms which are more effectual and salient in practice than formal laws and policies. This mode of extra-legal regulation and oversight of the sector has resulted in an experience of, at times, uncertainty and vulnerability on the part of the foreign welfare workers in terms of the permissibility and sustainability of their work. Despite this, the sector continues to slowly expand in the shadow of fairly well defined informal rules, with social legitimacy rather than formal legality functioning as the most important determinant of stability for foreigners working in this politically charged field. In Part IV, I examine the impact this model of extra-legal government engagement has for orphan welfare in China, including the operational challenges faced by the foster homes in relation to organizational finances, administration and advocacy. The most notable outcome of the tentative equilibrium in the field is a conspicuous absence of collaboration among the homes or (for the most part) between the homes and central authorities; moreover, strong motivation and political acumen is needed to succeed in the field. Accordingly, the ability of this sector of civil society to promote reform and improve orphan welfare across China is apparently somewhat stilted.

This Article is based on a broader research project investigating private orphan welfare providers in China.<sup>10</sup> My research is based primarily on interviews undertaken from July to October 2009 and July to September 2010 with representatives of orphan-related welfare providers in Hebei, Shandong, Henan, Shaanxi, Anhui, Shanxi, and Jiangsu provinces, as well as the Beijing and Shanghai municipalities.<sup>11</sup> On both research trips,

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<sup>10</sup> See Anna High, *Grassroots NGO Regulation and China's Local Legal Culture*, 9(2) SOCIO-LEGAL REV. 1 (2013); High, *China's Orphan Welfare System*, *supra* note 2. See also Anna High, *Government Beyond Law—Exploring Charity Regulation and Spaces of Order in China* (Dec. 1, 2011) (D. Phil. (Law) thesis, University of Oxford), [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2224147](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2224147) (examining the regulatory landscape relating to private orphanages, both foreign and domestically run, in China, and the formal and informal relationships between such homes and government).

<sup>11</sup> See *infra* Appendix A.

approximately half of my time was spent living at various orphanages and foster homes, helping out with child-care, administrative work, and English lessons, in order to more closely observe their operations and daily living. The subjects of study were approached based on personal introductions and snowball sampling. In total, over seventy-five people assisted in this research. All interviews were conducted on the condition of anonymity. Where referenced herein, organizations and place names are referred to by pseudonyms.

## II. BACKGROUND OF FOREIGN-RUN FOSTER HOMES

This section briefly overviews the history and scope of the foreign-run foster homes operating in China today. In-depth interviews and follow-ups were carried out at fourteen case study homes. In addition, two Chinese-run homes, both relatively new and inspired by the example of the foreign-run foster homes, were also included in the study. I believe that I contacted the majority of foreign-run foster homes in China, although there are no reliable data on the number of homes in the field. Accordingly, it is difficult to be more definitive on this point. Many of the homes have expertise in providing care for a particular population, as shown in the table of case studies below.

<i>Name</i>	<i>Specialization</i>
Prince of Peace	Cerebral palsy
St. Matthew's	Teenage boys
Compassion House	Brittle bones
Friendship Outreach	General surgical/medical intervention
Good News Training Centre	Visual impairments
New Grace Foundation	Birth defects, heart disease and palliative care
Mustard Seed Creations	Congenital heart defects
Beijing International China Relief (BICR)	General surgical/medical intervention
China Orphan Relief	General surgical/medical intervention

Lydia's House	Teenage girls
Loving Embrace	Surgery and home care
Bethany Care	Palliative care
Shooting Star	General surgical/medical intervention
Red Thread	Birth defects, especially cleft lip and palate
Mercy Home	Infants – Chinese-run foster home
Mothers' Arms	Infants – Chinese-run foster home

### *1. Prince of Peace and the Dongjian Homes*

In the city of Meihua, in northeast China, there is a grand, gated entrance to the newest campus of Prince of Peace Children's Village. All the buildings on this campus are newly constructed, clean and beautifully furnished. In the reception building, a double height entrance foyer with granite flooring and wooden paneling is lined with framed photos of the hundreds of children who have passed through Prince of Peace over the course of its decades-long history. Beyond the foyer and out the double French doors at its rear, all seven acres of the campus can be admired. There are six stand-alone "family" homes, a clinic, a preschool, and an elementary school, an arts and craft workshop, a community outreach center, and a hotel for visitors. The various buildings are connected by paved walkways that weave through landscaped ornamental gardens and numerous play areas.

There are over one hundred and fifty orphaned children living at Prince of Peace, with one caregiver on duty for every two to three children. The children were brought here from state orphanages across China to be treated for their special medical needs. As Prince of Peace's reputation for free, specialist medical and surgical intervention has spread among orphanage directors, its waiting list has grown and new buildings have been built to increase its capacity. More than six hundred children have come and gone, most of whom were adopted to Western families as arranged by their home orphanages. Adoptive parents may never find out about this grand "village" where their children spent months or years of their early lives; according to most adoption dossiers, the children at Prince of Peace remain in the care of their home orphanages.



Prince of Peace wasn't always located in Meihua. The organization was founded by an American couple, Robert and Lucy Gilbert. In the 1980s, the Gilberts felt a spiritual calling to begin fostering orphaned children from Chinese institutions to provide them with family-style care and medical treatment pending adoption to "forever families." They established a charitable organization in America to collect donations to support their mission and began bringing foster children from the Meihua state orphanage to stay in their own home in a housing estate in a nearby city, Dongjian. A Chinese philanthropist and Dongjian neighbor, Mr Zhao, facilitated the foster care arrangements with the Meihua orphanage. As the Gilberts took in more and more children, Mr. Zhao lent them a number of houses on the estate to house their continually growing foster family.

Over the years, the Gilberts inspired other like-minded expatriate neighbors and church friends, and their model of foster care spread to other homes in the same compound. Laura and Jesse, friends of the Gilberts who moved to Dongjian in 1999 to assist them in their charitable work, began taking in boys from the Meihua orphanage—teenagers with low prospects of adoption and often serious behavioral issues. "They never had a birthday and they never had a gift. They don't know how to handle it, being here with 'parents.'"<sup>12</sup> By 2002, there were six foreign-run foster homes in the compound, including St Matthew's, Compassion, Good News, and Friendship Outreach.

Around this time, the Gilberts were anxious to expand their mission but were beginning to feel uneasy about their dependence on Mr. Zhao's goodwill. They began looking for an alternative location for their work and struck up a deal with the Meihua city authorities. The government there, apparently with regard to the enormous financial benefits of having such a large potential employer move into its bounds, sold the Gilberts a large block of land for one RMB, or about fifteen cents (the translator dryly remarked at the time, "I think you should take it, it's a good deal."). Following this purchase, the Gilberts began building the sprawling, custom-made campus that is now the Prince of Peace Children's Village. The move was completed in 2006. The home is now one

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<sup>12</sup> Interview with Laura and Jesse, Founders, St Matthew's Foster Home, in Dongjian, China (July 29, 2010).

of the largest employers in Meihua, with scores of local Chinese women acting as primary caregivers for the residents. One of the conditions of sale was that a certain minimum square footage would be constructed on site, a stipulation that ensured many years of continued injection into the local economy. The campus is a source of pride for Meihua—police officers often visit with gifts, and the Meihua state orphanage brings visitors to Prince of Peace as an example of a “model foster home.”

Back in the Dongjian compound, the number of orphans being cared for by foreigners in the area was steadily increasing and gaining in notoriety. Large numbers of volunteers and prospective adoptive families were passing through, and all the homes were soliciting donations for their work through much-trafficked websites. From 2006 to 2007, the Dongjian homes began to experience unfavorable attention and escalating pressure from local Ministry of Civil Affairs<sup>13</sup> officials and police. This came in the form of surprise “inspections” and frequent phone calls and was mostly framed in terms of moving elsewhere rather than shutting down: “They were basically just saying: We don’t want this to be our problem—go somewhere else.”<sup>14</sup> “They didn’t tell us to close, they told us to move. At first, it was friendly, then it became more pressured, with constant knocks on the door.”<sup>15</sup> It also appears that pressure was exerted “upstream” on the Meihua orphanage director, as Meihua decided to recall its children from the various Dongjian foster homes in 2007, a decision most interviewees attributed to the influence of the MCA. Some of those children had been living in Dongjian for years. “That was heart-breaking—the older kids had been there all their lives. They were seven and eight and nine, this

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<sup>13</sup> The Ministry of Civil Affairs (*Minzhengbu*, hereinafter “MCA”) is the administrative authority responsible, *inter alia*, for welfare programs for marginal groups. The central MCA is complemented by MCA bureaus at both the provincial and local level. For an overview of the issues confronting the MCA in fulfilling its mandate, see LINDA WONG, MARGINALIZATION AND SOCIAL WELFARE IN CHINA 153 (1998) (noting the department’s “impossible wide range of duties, their disparate nature, and lack of coherence . . . [as factors that are] not conducive to the emergence of agency goals and mission” and a “woefully deficient” staffing structure).

<sup>14</sup> Interview with Alain, Founder, Good News Training Centre, in Hebei, China (Aug. 24, 2009).

<sup>15</sup> Interview with Laura and Jesse, Founders, St Matthew’s Foster Home, in Dongjian, China (July 29, 2010).

was all they knew, suddenly taken to the orphanage. It must have been like getting hit in the face with a two-by-four.”<sup>16</sup>

Eventually, the larger, more visible homes, such as Prince of Peace and Good News, moved to new locations where they could take on more employees and wards; three smaller homes, St. Matthew's, Compassion House, and Friendship Outreach, each of which cared for around two dozen wards, were able to lie low and stay in Dongjian until the threats and visits eventually abated. According to Rebecca, the Chinese manager of Friendship Outreach, “that time, the hard time, is over now.” Jesse of St. Matthew's believes that once the larger homes moved on, the MCA decided the compound was “shut enough.” At the time of my last visit, the operators of the three Dongjian homes spoke with general security about the future of their work; this was mainly attributed to faith in God's protection. They were also all careful to avoid interaction with local authorities, although local police appeared to be aware of their continued presence. In the years that have passed since the crackdown, scores of children have received loving foster care in the remaining Dongjian homes, as described by one of the wards of Compassion:

I have scoliosis. I was abandoned by my family to the roadside when I was little. It was a kind passerby who picked me up and took me to the local orphanage. And that's where I lived for the next twenty years. . . . Because I never had parents, I didn't know what family life was, I didn't know what love was. It was here [at Compassion] that I came to know what love is. It was here that I first had a dad and a mom. They treat me like they do their own kids. . . . They are willing to spend time on us, to stay beside us, so we know love again. They know we need family. . . . I didn't just learn love here. I learned forgiveness. I have forgiven my biological dad and mom for abandoning me, because I know

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<sup>16</sup> Interview with Laura and Jesse, Founders, St Matthew's Foster Home, in Dongjian, China (July 29, 2010).

they knew not what they were doing. So, I pray for them.<sup>17</sup>

## 2. *Alternative Care Models*

The broad mission of Prince of Peace and the other foreign-run homes in the field is to foster orphans from state institutions on an informal but often long-term basis. This is done in order to provide surgical intervention or specialized care, with a view to improving the child's quality of life and adoption prospects. All of the case study homes were founded by people who felt a religious calling to "look after orphans in their distress."<sup>18</sup> All are relatively well-funded by mostly international donors, and as a result are able to provide a very high standard of living and quality of medical care as compared to the often underfunded state institutions, with excellent caregiver-child ratios. However, the case studies vary greatly in terms of size, scope and care models.

Some of the older and more established homes, such as Prince of Peace, Good News, New Grace, and Mustard Seed, employ dozens of local caregivers to care for scores or hundreds of children in expansive private grounds. Some, like St. Matthew's, are based in smaller suburban family residences and employ few, if any, domestic helpers. Still others lie somewhere in the middle of the spectrum. For example, Red Thread, founded by a South African expatriate, Alana Winterton, is a home that cares for over forty-eight babies under the age of three in two one-bedroom high-story apartments in the middle of Xi'an. The rooms of Red Thread are crowded with various volunteers coming and going, and a small staff of paid nannies who assist Alana in caring for her charges.

Loving Embrace, a Chinese-run organization, uses a comparable but slightly different model. After acquiring children from state orphanages and providing for their surgical needs, rather than being cared for by hired nannies in a central facility, each child is fostered to a foreign expatriate family who is willing to care for the child indefinitely, knowing adoption could happen very soon or not for some time.

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<sup>17</sup> Interview with Joanna, Resident, Compassion, in Dongjian, China (Sept. 1, 2010).

<sup>18</sup> "Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world." *James* 1:27 (New International Version).

Bethany Care is a slightly unusual case study, in that the foster home is located within the grounds of a state orphanage. Bethany Care was set up by the founders of New Grace foster home in partnership with one of their “sending” orphanages. The unit provides medical and hospice care to infants from the orphanage who would be unlikely to survive under normal circumstances, due to congenital conditions. The impressive hospice facility, which was constructed on the state orphanage grounds at New Grace’s expense, consists of a six-story building with 140 beds, a dental clinic, and an operating theatre. As Bethany’s Chinese campus manager wryly put it, “it’s hard to say who it belongs to.”<sup>19</sup> Bethany’s medical staff and volunteers are employed, trained, and supervised by New Grace to provide around-the-clock care and pain relief. While Bethany Care has a more clinical feel than most of the other foster homes, even there the children constantly receive individual attention, stimulation, and love. David and Carly Dale, founders of New Grace and Bethany Care, currently care for more than 300 babies and children across their various facilities, aged from a few weeks to five years old. In 2010, there were 405 new admissions, forty-three adoptions, 105 deaths, and 146 hospitalizations and surgeries. Their work is funded by the Dales’ personal finances and by donations from charities, corporations, and individuals overseas, mainly in the United States.

### **III. SOCIO-LEGAL ANALYSIS OF GOVERNMENT OVERSIGHT OF THE SECTOR**

A variety of legal structures and extra-legal strategies are used by the foreign-run foster homes to facilitate their work in China. While two of the case studies have succeeded in gaining formal registration with China’s Ministry of Civil Affairs as charitable enterprises, most are either registered as commercial enterprises or operating informally, without legal status—what interviewees referred to as “half under the table” or being in a “gray area.” This is consistent with the development of charitable non-profit organizations in China generally, which researchers note has been hampered by restrictions, gaps, and ambiguities in the NGO

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<sup>19</sup> Interview with Linda, Director of Bethany Care, in Henan (Sep. 24, 2009).

legislative framework.<sup>20</sup> As a result, most Chinese NGOs are unregistered<sup>21</sup> and experience “unstable legal status.”<sup>22</sup>

Existing literature tends to assume that unregistered grassroots NGOs “do not encounter too much interference from the government” and are not directly controlled by the state in the absence of registration,<sup>23</sup> there being a supervision gap that allows for greater freedom. However, the current study shows that at the local interface between state and society, oversight and control is frequently exerted informally. A combination of government oversight and back-turning exists in this regulatory space—widely spoken of in China as the “one eye open, one eye closed” approach. In this section, I survey the formal registration and certification prospects for privately-run foster homes in China, then turn to examine the more salient extra-legal norms and local state-society interactions and negotiations that impact foreign orphan welfare workers in the field.

### 1. *The Limited Role of Formal Laws and Policies: Pathways to Legality*

We’re not really that legal. We’re legal as far as the state orphanage is concerned. We have papers. But as far as [the Ministry of] Civil Affairs—are we legal? No. Foreign foster care, it’s such a vague thing. Anyway. So we just keep going. Well, what’s “legal” anyway? [laughing]<sup>24</sup>

The foreign foster homes are working in a field the permissibility of which is ambiguous at best. Although there is a

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<sup>20</sup> Yuwen Li, *Introduction to NGOs in China and Europe: Comparisons and Contrasts 2* (Yuwen Li ed., 2011); Junkui Han, *International NGOs in China: Current Situation, Impacts and Response of the Chinese Government*, in *NGOs in China and Europe: Comparisons and Contrasts* 23, 49.

<sup>21</sup> Li, *supra* note 20, at 3; *Civic Freedom Monitor: China*, *supra* note 5 (noting that estimates for the number of unregistered non-profit organizations in China range from a few hundred thousand to a few million).

<sup>22</sup> Peifeng Liu, *Development of Charities in China Since the Reform and Opening Up*, in *NGOs in China and Europe: Comparisons and Contrasts*, *supra* note 20, at 71, 90.

<sup>23</sup> Xiaoyuang Kang & Hen Heng, *Graduated Controls: The State-Society Relationship in Contemporary China*, 34 *MODERN CHINA* 36, 48 (2008).

<sup>24</sup> Interview with Laura and Jesse, Founders, St Matthew’s Foster Home, in Dongjian, China (July 29, 2010).

State Council regulatory measure that seems to provide a pathway for residents, including foreign nationals, to set up foster homes in China,<sup>25</sup> the measure requires pre-approval from and partnership with the provincial-level Ministry of Civil Affairs bureau,<sup>26</sup> something that none of the foster homes pursued in establishing operations. Instead, the homes generally used a gradual “forgiveness rather than permission” strategy, beginning with informal home-based care of a small number of foster children with arrangements based on good *guanxi*, or personal connections, with state orphanage directors.<sup>27</sup> Over time, as trust and *guanxi* developed, each home’s capacity and scope expanded, sometimes to the point where several hundred children were being cared for. In most cases, these wards officially remain under the guardianship of their sending orphanage.<sup>28</sup> It is not just a matter of children being relocated to a nearby facility under the closer supervision of the state orphanage. Most foster homes care for children from distant provinces, with little to no ongoing interaction with the home orphanage. Children are frequently taken overseas for surgery, often for months or years at a time, or may receive surgery in Shanghai, Beijing, or the home itself. Given the extreme health issues experienced by most new arrivals, deaths are not uncommon.

More generally, while all of the foster homes started out without legal personality or status, about half of the homes have since looked into formally registering as NGOs under the Chinese legislative framework. However, until very recently,<sup>29</sup> there were

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<sup>25</sup> Shehui Fuli Jigou Guanli Zanxing Banfa (社会福利机构管理暂行办法) [Social Welfare Institutions Administration Interim Measures] (promulgated by the Ministry of Civil Affairs, Dec. 30, 1999, effective Dec. 30, 1999) (China).

<sup>26</sup> *Id.* art. 15.

<sup>27</sup> Kang, *supra* note 23. The one exception was the operators of St Matthew’s, who report that they spent two years attempting to gain permission from the Taiyuan, Shanxi MCA to set up a foster home before realizing it “wasn’t going to happen” and moving to Dongjian to emulate the Prince of Peace approach.

<sup>28</sup> Two of the foster homes, Red Thread and Lydia’s House, have signed ongoing contracts with a specific state orphanage to act as temporary guardians; it is notable that Lydia’s House pays an annual fee of 30,000 RMB as consideration for the arrangement.

<sup>29</sup> Zhonghua Renmin Gongheguo Jingwai Fei Zhengfu Zuzhi Jingnei Huodong Guanli Fa (中华人民共和国境外非政府组织境内活动管理法) [Law on Foreign NGO Management] (promulgated by the Standing Comm. Nat’l People’s Congress, Apr. 28, 2016, effective Jan. 1, 2017) (China). Permits foreign non-profit organizations to operate in China, filling a longstanding gap in Chinese law vis-à-vis foreign NGOs. However, it remains to be seen whether registration under this new law is a feasible pathway to legality for foreign NGOs, given that the law restricts religious activity and requires an official

no laws or regulations providing for the registration of foreign-run NGOs other than as foreign foundations;<sup>30</sup> the foundation pathway is not apposite for the foster homes, as “foundation” appears to refer to groups that disburse charitable funding rather than carry out charitable activities directly.<sup>31</sup> Despite this, two of homes—Shooting Star and New Grace—have succeeded in registering as “Representative Offices of a Foreign Foundation” under the Foreign Regulations, but only after many years of unregistered operations and at times antagonistic relations with local authorities. Lawyers for these two homes each described the process of registration as dependent on impressive political ties, as approval is contingent on the central MCA agreeing to act as “professional supervising unit” (*yewu zhuguan danwei*).<sup>32</sup> According to my informants, and also as reported by other researchers, it is exceedingly difficult to gain such cooperation from the MCA without influential political connections in high places.<sup>33</sup>

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Chinese sponsor. It is possible, and perhaps likely, given the restrictive spirit of the law and experience of the foster homes to date, that it will be very difficult to obtain approval under the new law. See generally Edward Wong, *Clampdown in China Restricts 7,000 Foreign Organizations*, N.Y. TIMES (Apr. 28, 2016), [http://www.nytimes.com/2016/04/29/world/asia/china-foreign-ngo-law.html?\\_r=0](http://www.nytimes.com/2016/04/29/world/asia/china-foreign-ngo-law.html?_r=0) [https://perma.cc/J3FS-BT6F].

<sup>30</sup> See Shehui Tuanti Dengji Guanli Tiaoli (社会团体登记管理条例) [Regulation on Registration and Administration of Social Organizations] (promulgated by State Council, Oct. 25, 1998, effective Feb. 6, 2016), art. 2 (China); Minban Feiqiye Danwei Dengji Guanli Zanzheng Tiaoli (民办非企业单位登记管理暂行条例) [Interim Regulations on Registration Administration of Private Non-enterprise Units] (promulgated by State Council, Oct. 25, 1998, effective Oct. 25, 1998), art. 2 (China) (limiting registration of “social organizations” and “private non-enterprise units”, the two types of organizations in the Chinese NGO legislative framework, to Chinese citizens) [hereinafter PNEU Regulation]. See generally, Jillian Ashley & Pengyu He, *Opening One Eye and Closing the Other: The Legal and Regulatory Environment for “Grassroots” NGOs in China Today*, 26 B.U. INT’L L.J. 29, 73; Han, *supra* note 20, at 49 (noting gaps in the law for foreign NGOs).

<sup>31</sup> Jijinhui Guanli Tiaoli (基金会管理条例) [Regulations on Foundation Management] (promulgated by State Council, Mar. 8, 2004, effective June 4, 2004), art. 29 (China), <http://en.pkulaw.cn/display.aspx?cgid=52033&lib=law>, [https://perma.cc/D63H-5PL9] [hereinafter Foundation Regulation] (limiting Foundation staff and other administrative expenditures to 10% of total expenditures).

<sup>32</sup> *Id.* § 7 (designating the central MCA as the “professional supervising unit” (*yewu zhuguan danwei*) for representative offices of foreign Foundations and Foundations whose legal representative is a non-citizen).

<sup>33</sup> Keyser, *supra* note 6, at 54 (reporting that since the enactment of the Foundation Regulation in 2004, anecdotally there was a window of only six months in that year during which foreign NGO registration applications were accepted by the central MCA); Ashley & He, *supra* note 30, at 75 (noting that the MCA appears to routinely stall review of foreign foundation applications); Han, *supra* note 20, at 49 (noting the lack of meaningful



Even apart from these barriers, other provisions lessen the utility of the Foundation Regulation for foreign NGOs, including very high minimum capital requirements,<sup>34</sup> restrictions on expansion,<sup>35</sup> and the prohibition on soliciting or accepting donations within China.<sup>36</sup>

In all, the formal legislative framework for non-profit organizations and charitable enterprises is, in a practical sense, largely irrelevant to the foreigners operating foster homes in China, with formal registration not generally a viable or desirable option. This is consistent with the non-profit sector in China generally, which for the most part operates outside restrictive formal laws and policies on registration and oversight.<sup>37</sup> Given the uncertainty of their legal status, the interviewees tended to describe their work as permitted in practice but technically illegal. Local and provincial level officials frequently refer to their operations as “illegal” or “not allowed,” usually on the basis of an assertion that only the government can care for Chinese orphans. The one state orphanage director who was willing to be interviewed denied knowledge of any foreign-run foster homes, despite the fact that other foster homes interviewed were caring for dozens of children from his facility.<sup>38</sup> From a political perspective, this opacity and disapprobation is unsurprising, given that the sector involves an

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registration prospects for NGOs generally); Interview with Mr. Yang, Director, Shandong Charity Federation, in Shandong, China (Sept. 21, 2009) (admitting that registration prospects are essentially dependent on having “a close relationship with government.”).

<sup>34</sup> Foundation Regulation, *supra* note 31, art. 8.

<sup>35</sup> Foundation Regulation, *supra* note 31, art. 12.

<sup>36</sup> Foundation Regulation, *supra* note 31, art. 25. *See generally*, Li, *supra* note 20, at 2 (characterizing the current Chinese NGO legislative framework as restrictive and controlling in nature).

<sup>37</sup> *See* Han, *supra* note 20, at 49 (noting gaps in the law for foreign NGOs and a lack of meaningful registration prospects for NGOs generally, such that the Chinese NGO framework is in practice ineffectual and marginalized); *see also* Ashley & He, *supra* note 30, at 32 (noting that due to barriers to obtaining formal recognition and legal status, “most independent NGOs thus operate outside the supervisory gazes of sponsoring agencies and the MCA in various quasi-legal states”); JONATHAN SCHWARTZ & SHAWN SHIEH, STATE AND SOCIETY: RESPONSES TO SOCIAL WELFARE NEEDS IN CHINA 15 (2009) (noting that China’s restrictive NGO regulation has been ineffective and has “deterred many NGOs from registering and driven them into an informal sector where they operate as businesses or as unregistered NGOs.”).

<sup>38</sup> Interview with Mr. Wang, Director, Hedong City State Welfare Institute, in Shandong, China (Sept. 21, 2009).

intersection of such sensitive issues as abandonment, child welfare, and foreign/church-affiliated humanitarian relief.

## 2. *Extra-Legal Regulation: Pathways to Legitimacy*

The majority of the case study homes are not registered domestically as charities, and accordingly either operate without legal personality or use the legally dubious but common method of registering as commercial enterprises.<sup>39</sup> Accordingly, they function outside of the restrictive and ambiguous formal legal framework for NGOs, charities, and orphan welfare. In relation to such quasi-legal NGOs more generally, Ashley and He report that this is a “situation which the state is aware of and which it variously cracks down upon, tolerates, or even encourages by partnering with those organizations, when useful to state ends.”<sup>40</sup> This was evident in the field, where the general sense was that local authorities take a “one eye open, one eye closed” approach to foreigners involved in the provision of care to orphaned children. While the majority of the case study homes intentionally seek to maintain low visibility in China, almost all have at least some dealings with local state officials (it is generally not possible for a home with more than a dozen or so children to operate completely under the radar vis-à-vis local, or indeed central, authorities). However, such interactions are usually not governed by formal laws and regulations. Rather, the ability of foreigners in the sector to carry on their work and successfully negotiate with the state at the local level seems to depend more on their accrued legitimacy, in the eyes of the state, than on the legality of their work. To put it another way, it appears that *legal* legitimacy—in the sense of being in compliance with legal rules—is

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<sup>39</sup> See *infra* note 72 and accompanying text. One exception is Bethany Care, whose expatriate founders/managers chose to entrust a Chinese friend to register the home as a “Private Non-Enterprise Unit” (*minban fei qiye danwei*), a type of formal Chinese NGO. PNEU Regulation, *supra* note 30. Note that since promulgation of the new Charity Law in 2016, PNEU are now known as “social service organizations” (*shehui fuwu jigou*), and in this way obtain status as a domestic NGO and bypass the lacuna for foreign-run NGOs. Cishan Fa (慈善法) [Charity Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2016, effective, Sept. 1, 2016), *translated in* <http://en.pkulaw.cn/display.aspx?id=21807&lib=law> [<https://perma.cc/D7SD-K4Y8>]. The risk of such an arrangement is that the foreign founders’ “ownership” and control of Bethany is not legally enforceable, meaning they could lose their directorship and control over the home if the Chinese legal representative were to choose to exercise independence.

<sup>40</sup> Ashley & He, *supra* note 30, at 132.

not of central importance here.<sup>41</sup> As explored below, foreigners in the field tend to depend on other types of legitimacy—political, administrative, and social—that are not contingent on their compliance with (vague and restrictive) legal rules,<sup>42</sup> a finding that is consistent with the general emphasis in Chinese NGO scholarship on legitimacy as the touchstone for stability.<sup>43</sup>

Many interviewees were fairly confident about their ability to continue operating quasi-legally, without state interference, because of the political and social significance of their contributions to the state orphan welfare system and local economies alike, contributions for which local authorities appear to receive political credit within the state apparatus (“this all accrues to the unspoken economy in the Party”)<sup>44</sup> and which bolster community support for foreign foster care. Surgical intervention provided by the foster homes often results in children becoming “adoptable” who were previously destined to live out their childhoods in state facilities at the state’s expense. Private foster homes with large operating budgets met by private donors bring large influxes of capital and increased employment opportunities to local communities. On the other hand, the foster homes also emphasized the political risks to local officials and state orphanage directors involved in “closing an eye” to the “illegal” nature of the work occurring in the foster homes. As a result, a network of informal, unspoken, extra-legal norms are at play in negotiations with the state. As discussed in this

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<sup>41</sup> There are, however, many practical inconveniences associated with the lack of legal legitimacy, discussed below in Section IV.

<sup>42</sup> Han, *supra* note 20, at 35 (citing Gao Bingzhong, *The Question of Legitimacy of Social Organizations*, in CHINA SOCIAL SCIENCES 2 (2000), dividing legitimacy into four-part typology: legal [recognition and formalization through legal institutions]; political [relating to political correctness of an organization’s agenda and actions]; social [relating to congruence with the expectations and norms of society] and administrative [involving recognition/acceptance by a bureaucratic system]). Note that in Chinese, “legitimacy” can be translated as *heli* (a broad concept meaning compliance with truth/reason) or *hefa* (narrower concept denoting compliance with law).

<sup>43</sup> See, e.g., Han, *supra* note 20, at 35 (arguing that for international NGOs, due to gaps in the current legal landscape, political legitimacy is the precondition for their existence in China); Xie Haiding, *Public Interest Legal Organizations in China*, in NGOs IN CHINA AND EUROPE: COMPARISONS AND CONTRASTS, *supra* note 20, 117, 136 (arguing that where legislative provisions are vague, political correctness is the “guiding doctrine in selective law enforcement and selective administration of justice.”).

<sup>44</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009). See also Interview with Co-founders/Directors, Loving Embrace, in Shanghai, China (Oct. 8, 2009).

section, compliance with those norms, as well as the ability to negotiate protective *guanxi* or relationships, is key to legitimacy, longevity, and security in the sector and has a significant impact on local state-society dynamics.

i. Rules of the Game

”Foreign orphanages fly in the face of their sense of pride and control”.<sup>45</sup>

At the local level, interactions with state authorities—such as township leaders, local MCA officials, and local police—tend to take the form of unannounced visits and drop-ins, occasionally involving subtle or clear threats that are variously referred to by the recipients as “awkward hints,” “being told off,” or “scoldings.” The level of interest and tolerance of the officials of a particular area also appears to depend largely on location and on the number of other foster homes operating in the area (presumably because it would be easier for local officials to claim lack of knowledge, if called to account by their superiors, in relation to one or two foster homes than in relation to half a dozen). Rarely are there outright threats to completely shut down a home’s operations, and rarely are such threats followed through—whether because government tacitly approves of private orphan welfare work or for other reasons, such as an unwillingness to draw negative publicity, or the inability to care for the children themselves were the homes to be shut down. It is much more common for a foster home to be asked to leave a particular administrative region (an observation which accords with the decentralized and fragmented nature of Chinese regulatory bureaucracy), or for a period of scolding to simply peter out in time.

In terms of negotiating these interactions, the interviewees expressed a very clear understanding, whether tacitly or explicitly, of the informal rules that govern their relationships with state orphanages and officials at this local level. Broadly, these informal norms seemed to relate to two state concerns: first, to be assuaged of fears of subversive intentions on the part of foreigners; and second, to prevent a loss of face,<sup>46</sup> domestically and internationally,

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<sup>45</sup> Interview with Austin, Lawyer, New Grace, in Beijing, China (July 7, 2010).

<sup>46</sup> For a useful outline of the place and importance of face in Chinese culture, see Hsien Chin Hu, *The Chinese Concepts of “Face”*, 46(1) AM. ANTHROPOLOGIST 45 (1944)

resulting from a proliferation of foreigners conspicuously caring for Chinese babies. It is these rules, rather than law and policy in a narrower sense, that largely determine the security and sustainability of foreign foster homes and govern the varying degrees of engagement occurring between different faces of the state and society.

First, operators spoke of the need to assuage “government fears” of subversive intentions of charitable workers. Many interviewees spoke of how poorly received their charitable efforts are in China, and of experiencing ridicule or even strident objections to the idea of helping strangers without personal benefit or hidden motives. For example, a common accusation levelled against males in the field is that they have illegitimately fathered the children in their care or intend to sell the children to foreign friends. Additionally, people with strong religious motivation and affiliations run all the homes, and almost all receive significant financial support from Western donors, primarily in the United States—both factors that typically draw wary scrutiny in China. Accordingly, transparency and openness was generally considered very important when dealing with local police and MCA officials and village leaders, and all interviewees had very strict rules against proselytism by staff and volunteers in their neighborhoods (although most were very open within their walls and with visitors, Chinese and foreign alike, about their religious motivations).

Secondly, there was a strong norm among all operators of avoiding any behavior that could potentially draw attention, domestically or internationally, to the disparity between official government policy on the care of orphans, and the reality of the wealth of foreigners caring for children still technically in the guardianship of the state. As one (Chinese) interviewee described the dynamic:

Orphanages are very emotive. Orphans are the most vulnerable people in China, and it's easy to see that public opinion could be very positive or negative. If something went wrong, it could be very, very negative—”What's the Chinese government doing

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(explaining the importance of maintaining credibility and a good reputation in public in the Chinese culture).

giving our kids to some foreigners? Why can't we take care of our own kids?" . . . Any self-respecting country may have a problem explaining to its people why we cannot take care of our own kids.<sup>47</sup>

While many were candid with me about their concerns over the quality of care in state orphanages, all interviewees were keenly aware of the risks associated with embarrassing China through publicity about their mission to improve state care for orphaned children: "They worry that we're going to embarrass China by what we're doing, on an international basis, by showing the world that China is not doing its job looking after its children."<sup>48</sup> The homes recognized that in order to be able to stay in the game, it was important to contribute to government "face" by helping maintain the impression, domestically and internationally, that Chinese state orphanages are not in dire need of assistance: "I live in a twilight zone between the reality of what it is, and what I have to portray it to be."<sup>49</sup> In this vein, Mustard Seed Creations expressed relief that their reputation is now sufficiently well established that they no longer need to approach the state orphanages with offers of help, because "if they request help [from us], it feels like they're more choosing to get help from us, not us helping them."<sup>50</sup> Private foster home websites tend to refer to "partnerships with the Chinese government" or the "best efforts" being made by China to care for its orphans, and domestic fundraising efforts (if any) by foreigners in the field are generally done quietly—"We don't want the community to think the orphanage is not caring for their children. We don't want to bring them any shame, only positive recognition."<sup>51</sup> When Alana of Red Thread referred in her blog to a healthy former ward who had died on returning to a state orphanage, she was immediately subjected to days of government visits and

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<sup>47</sup> Interview with Austin, Lawyer, New Grace, in Beijing, China (July 7, 2010).

<sup>48</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009).

<sup>49</sup> Interview with Alana, Founder/Director, Red Thread, in Shaanxi, China (Sep. 27, 2009).

<sup>50</sup> Interview with Manager, Mustard Seed Creations, in Beijing, China (Aug. 11, 2010).

<sup>51</sup> Interview with Volunteer Coordinator, Wuzhong Child Welfare Institute, in Jiangsu, China (Oct. 9, 2009).

threats that her home would be shut down; "I can understand why; I embarrassed them."<sup>52</sup>

This issue of pride is an important reason behind the use of Chinese staff as primary caregivers in all of the homes, with Western volunteers and employees restricted to assisting the core Chinese staff or providing medical assistance on a short-term basis:

It's always a trust issue. We've been told by our officials here [in town] that they'll never trust foreigners. No matter what you do, they always think you have an ulterior motive. That you're using the children to make money. This is another reason why we're very clear that foreigners don't receive salary . . . The Chinese staff have the ultimate say on decisions here, the final decisions. We get consensus, not majority decisions. The staff make a big point of that to visitors, and that we don't receive salaries.<sup>53</sup>

Because of the no-no of having foreigners care for kids, using American house parents would raise all sorts of issues. But as it is, when the MCA come, they see that every face caring for kids is Chinese . . . We're saving them from abandonment, not from being Chinese.<sup>54</sup>

Both Mustard Seed and Prince of Peace also noted that their employment of Chinese caregivers is an intentional part of a broader strategy of localization, which provides short-term protection against the common complaint from society and government alike that "China doesn't need foreigners to look after its children," and long-term protection for the continuity of the foster home's mission in the event that foreign founders and managers are asked or forced by circumstances to leave China. "Our goal is that if we were kicked out, this could all continue. You have to hold everything

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<sup>52</sup> Interview with Alana, Founder/Director, Red Thread, in Shaanxi, China (Sep. 27, 2009).

<sup>53</sup> Interview with Manager, Mustard Seed Creations, in Beijing, China (Aug. 11, 2010).

<sup>54</sup> Interview with CEO, Prince of Peace, in Meihua, Hebei Province, China (Sep. 1, 2009).

lightly. Things change. You always keep in the back of your mind that we very well one day may not be here.”<sup>55</sup> All of the interviewees were slow to criticize the quality of care in the state system. There was a conspicuously collaborative and supportive tenor to orphanage-foster home relationships, which is not say that the interviewees were not genuine in their apparent sympathy for the underfunded, overworked state system, but rather to note that “China-bashing” was noticeably absent in the field, which some acknowledged as an important reason their work is allowed to continue.

These rules of the game are just as relevant to cultivating trust between foster homes and state orphanages:

It’s always a risk; the state orphanages are walking a fine line, a tightrope—because the MCA doesn’t trust foreigners. So we sort of bow to the state orphanages, and how they want to do it—if they want us to come to dinners with officials, or if they want us to not be visible. It all depends on *their* relationship with the MCA.<sup>56</sup>

Many state orphanages take great care to keep any arrangements with foreign foster homes under the radar. For example, it is often not disclosed to new adoptive parents that their child has been in the care of a foster home, which a number of interviewees believe is because “they don’t want to admit that they sent their kids away to be dealt with by foreigners.”<sup>57</sup> Foster homes commonly try to include clues in adoption dossier paperwork to help new parents track down their child’s history after leaving China, with varying levels of success; the implications of this imposition of a truncated history on adopted children, for whom history and identity are very often repressed or compromised to a harmful extent anyway,<sup>58</sup> should not be overlooked.

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<sup>55</sup> Interview with Manager, Mustard Seed Creations, in Beijing, China (Aug. 11, 2010).

<sup>56</sup> Interview with Manager, Mustard Seed Creations, in Beijing, China (Aug. 11, 2010).

<sup>57</sup> Interview with CEO, Prince of Peace, in Meihua, Hebei Province, China (Sep. 1, 2009).

<sup>58</sup> BARBARA YNGVESSON, *BELONGING IN AN ADOPTED WORLD* 174–76 (2010).



Informal fostering arrangements are only possible when the foster home has built up for itself a good reputation as a caregiver (“our standard of work gives them a bit of safety”)<sup>59</sup> and has demonstrated that it will abide by the unspoken rules of the relationship. When those rules are breached—for example when a foreign foster home casts a bad light on state orphanages through unfavorable comments in newsletters or blogs—a common response is for children to be taken back to their home orphanages, sometimes with tragic consequences.<sup>60</sup> As one interviewee put it: “The kids are not ours. At any moment, they can take the kids back, and they have done in the past.”<sup>61</sup> Overall, interviewees expressed a keen awareness of the need to “give face” to state orphanages in order to maintain rapport and stable foster arrangements: “We don’t want to tell the orphanages what to do—we try to do what they feel comfortable with.”<sup>62</sup>

## ii. Friends in High Places

Many of the case studies have deliberately cultivated “umbrella arrangements” or protective informal social or political partnerships, such as with influential local figures, government-organized NGOs,<sup>63</sup> state orphanages, or other NGOs. Such partnerships are seen as bolstering legitimacy and providing some measure of protection against government charges of illegality or stepping out of line: “You need somebody somewhere willing to say,

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<sup>59</sup> Interview with David, Founder/Director, New Grace, in Beijing, China (Aug. 24, 2010).

<sup>60</sup> Interview with Alain, *supra* note 14; Interview with Will Peters, *supra* note 44; Interview with David, *supra* note 59 (all reporting deaths on return of a child to sending orphanage).

<sup>61</sup> Interview with Founder/Director, BICR, in Beijing, China (Aug. 27, 2009).

<sup>62</sup> Interview with PR Officer, Mustard Seed Creations, in Beijing, China (Aug. 21, 2009).

<sup>63</sup> GONGOs, also known as “officially organized NGOs” as compared to “popular NGOs” are “citizen-led efforts from organizations that are nominally independent, but in fact are often established by and retain close ties with the state.” Ashley and He, *supra* note 30, at 32. Usually registered as Social Organizations, GONGOs are commonly referred to as a type of NGO, but may not meet Salamon’s internationally accepted definition of an NGO, in particular the requirements of voluntariness and self-government. See Lester Salamon & Helmut Anheier, *In Search of the Non-profit Sector I: The Question of Definitions*, 3(2) VOLUNTAS 125, 125 (1992) (defining non-profit sector organizations as formal, private, non-profit-distributing, self-governing and voluntary).

‘I know that guy—he won’t give you any trouble.’”<sup>64</sup> For example, the Dales of New Grace believe a major reason they have not been hassled more often by local officials is because of the prominent display, in their foyer, of a letter from Tung Chee-hwa, former governor of Hong Kong, commending “the people of [New Grace’s township] for their work in caring for orphans.”

Similarly, in response to the escalating local pressure in the Dongjian compound, both Good News and Prince of Peace decided to seek protection and security (in case of future such incidents) by relocating and forming partnerships and *guanxi* with different Government Organized Non-Governmental Organizations (GONGO) and the Ministry of Civil Affairs (MCA) departments, instead of keeping a low profile as three other orphanages in the area did. Alain moved Good News to the safety of a town in a different province in which no other foreigners, let alone foster homes, were located,<sup>65</sup> and began to construct new facilities tailored to the needs of his vision-impaired wards. He has also developed a relationship with a GONGO, the China Association for Social Work (CASW), which he describes as a type of insurance against low-level interference in the new township: “Sooner or later we will need to meet them [local MCA], or the higher authorities will say to them, ‘who are these guys?’ Right now, it’s only the police who really care about what we’re doing. If we can get registration [with the CASW] at the central MCA level, well we’ll be above those guys.”<sup>66</sup>

Bethany Care similarly benefits from its partnership with a state orphanage. Its newly-constructed building is on a state-owned orphanage lot. By all appearances, the work done within has been appropriated by the state orphanage itself (although David and Carly, as directors in absence, retain independence in practice), and credit for the institution’s work is often taken by the state orphanage bureaucracy: “They get a pat on the back for it—it’s a star in

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<sup>64</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009).

<sup>65</sup> Interview with Founder/Director, BICR, in Beijing, China (Aug. 27, 2009) (choosing a location where no other foster homes were located because, in locations like Dongjian, “the local authorities know too much.”).

<sup>66</sup> Interview with Alain, founder of Good News Training Centre, in Hebei (Aug. 24, 2009).

Director Pei's crown."<sup>67</sup> These examples illustrate the most obvious incentive for government agencies in such partnerships and *guanxi* with foreign foster homes—the appropriation of political credit for palatial new child welfare homes without any expenditure of time or money. In fact, most sending orphanages still receive per capita state funding even for wards that are residing at the foster homes. On the other hand, government departments bear a clear risk of such arrangements, especially at the local and provincial level, in the event something goes wrong. As David put it, “if it’s done well, it’s a big plus . . . The risk is if they work with an organization that doesn’t do it well.”<sup>68</sup> Therefore, such *guanxi* can generally only be cultivated after years of problem-free operations, in line with the informal rules relating to pride and suspicion and demonstrated excellence in foster care.

Other interviewees spoke of the potential costs of seeking closer associations with government and GONGO entities. As Ellie at Compassion put it: “We’ve never registered. We just don’t want to be under the government’s thumb, telling us as to what we can and can’t do. [Registration would mean] they get to decide where the money is spent. We don’t want to give them that control.”<sup>69</sup> China Orphan Relief is a case in point. Until 2009, the foster home was operating as a non-entity in China. However, its operations were extensive, with around 400 children being cared for in seven locations. According to its former director, Will Peters, an American businessman now living in China, the inconvenience of China Orphan Relief’s lack of registration became problematic: “We reached a point where if we could clearly see long-term sustainability, we needed to change our operation.”<sup>70</sup> Faced with a choice between seeking registration or formalizing the COR’s interaction with orphanage or MCA officials, Will decided instead to partner with an already-registered NGO, Shooting Star, believing that the benefits of registration would not have outweighed the

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<sup>67</sup> Interview with David, founder and director of New Grace, in Beijing (Sep. 17, 2009).

<sup>68</sup> *Id.*

<sup>69</sup> Interview with Ellie, Manager, Mustard Seed Creations, in Beijing, China (Aug. 11, 2010).

<sup>70</sup> Interview with Will Peters, founder/CEO of China Orphan Relief, in Beijing, China (Aug. 25, 2009).

burdens thereof. When pushed on what those burdens were, Will responded:

Burdens? You have to play ball, which costs money and eats resources, and you can't make decisions solely on what you think is best for the organization. So, you get caught up in government's planning and priorities . . . You get sucked into all the vicissitudes of the Chinese political system. I just want to be little [in size of operations] and take care of kids.<sup>71</sup>

A related protective strategy is to register as a commercial enterprise with the State Administration for Industry and Commerce (SAIC). Registration of a charitable enterprise as a commercial entity is clearly incongruous, but reportedly very common in China.<sup>72</sup> Three of the foster homes have registered representative offices of overseas entities with the SAIC and received licenses in their efforts to "encourage tourism, commerce and investment in China," to carry on as "consultants for visual impairment equipment," and to conduct "market research relating to orphanage and rest home equipment," respectively. Commercial registration is often more convenient than acting as a non-entity and provides some measure of "quasi-administrative legitimacy,"<sup>73</sup> in that the foster home is given a legal personality and some state recognition; on the other hand, such organizations are clearly acting outside the mandate of their SAIC licenses. The SAIC is aware of the trend for foreign NGOs to register as a business entity in China, and at various times, it has issued new directives limiting the number and variation of the organizations' names that can be used by representative offices "in a bid to prompt NGOs sailing under a business flag of convenience to re-register with the [MCA]."<sup>74</sup>

Rather than prompting deregistration, these "name change" rules have simply led to creative circumvention. New Grace's overseas charity name, in Chinese, includes the word "*jijinhui*"

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<sup>71</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009).

<sup>72</sup> *Civic Freedom Monitor: China*, *supra* note 21.

<sup>73</sup> Han, *supra* note 20, at 35.

<sup>74</sup> Tina Qian & Nick Young, *Rule on Names Starts to Close Door to NGO "Businesses"*, CHINA DEV. BRIEF (Jan. 14, 2010), <http://www.chinadevelopmentbrief.com/node/74> (on file with author).

(foundation)—they changed this to “*fendashen*,” an alliteration of the English equivalent, in order to avoid scrutiny by the SAIC when their license is renewed.<sup>75</sup> Good News has removed “foster home” from its name, becoming instead a “training center,” and has opened both a business and a charity in Hong Kong (Good News China Ltd. and Good News China Foundation Ltd., respectively). This strategy has allowed them to register a representative office of the former with the SAIC while using the existence of the latter associated organization to argue with the Chinese tax department that the representative office should not be taxed.<sup>76</sup>

### iii. Negotiated Relations with Local States

Despite the friends in high places that some foster homes have cultivated over the years, most of the homes still interact exclusively with local-level officials, and there is a general sense of reliance on their goodwill: “It all depends on who is in charge of your county—if he doesn’t care, then you’ll have no problems.”<sup>77</sup> Good News explained their sense of being at the mercy of local leaders when seeking to construct new buildings on their premises:

All we could do was ask the village chief for permission. He said yes, and scribbled something on a piece of paper, but legally he has no authority to approve this. If the government were to compulsorily acquire our land, well, we would need to rely on the village chief’s connections with the provincial authorities for protection. But we’ve never paid bribes to him, unlike our landlord, who owns the main building. [Our landlord] would be O.K., because he has cultivated good governance [through paying bribes]. So, do we play his game, and get some protection, or risk losing everything? Some things are just culturally accepted here; they’re part of the customs. But you don’t want to do

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<sup>75</sup> Interview with David, founder and director of New Grace, in Beijing, China (Aug. 24, 2010).

<sup>76</sup> Interview with Alain, Founder, Good News Training Centre, in Hebei, China (Aug. 20, 2010).

<sup>77</sup> *Id.*

something you don't feel 100% comfortable with or cannot be morally accountable for. [Pause]. You can't win this war!<sup>78</sup>

Many interviewees felt that, despite being often threatened by officials with closure or legal action because of the antipathy toward foreigners looking after Chinese babies and because such homes are considered illegal, the chance of such threats being carried through was slim. Rather, the frequent threats or scolding received by foster homes may be more a way for government to maintain face and demonstrate power, rather than any genuine attempt to have the law on the books enforced. For example, Ellie of Compassion told me that her (American) family's passports and papers were once held by local police for a week without apparent reason, which in her view was "just to prove that they could. It was just to prove that they really are in control . . . But they know what we're doing is good work, as long as we don't cross that line."<sup>79</sup>

I witnessed a number of threatening but blustering incidents during my stay at New Grace Foundation. On one occasion, David asked me to come upstairs and translate an apparently very heated argument going on between a man from the town offices and the home's Chinese staff manager. He was irate that one of New Grace's nannies had been fired for striking a child, something that all staff are forbidden to do as a condition of employment. He had come in to demand her reinstatement. The staff manager humbly acknowledged his concerns, before sending him next door to drink *baijiu* (Chinese liquor) with the male chef and drivers. Austin, New Grace's lawyer, also recounted an incident in which a local government issued a warning that the main foster home building at New Grace would be imminently demolished because it had been constructed in an industrial zone without planning permission.<sup>80</sup> At the time of construction, there had been no way to apply for a zoning change because the foster home was not certified, and the buildings were built without the permit. Some years later, the demolition notice arrived: "We panicked, we thought the bulldozers

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<sup>78</sup> Interview with Alain, Founder, Good News Training Centre, in Hebei, China (Aug. 20, 2010).

<sup>79</sup> Interview with Co-founders/Directors, Compassion, in Dongjian, China (Sept. 1, 2009).

<sup>80</sup> Interview with Austin, Lawyer, New Grace, in Beijing, China (Sept. 5, 2009).

were coming down the road.”<sup>81</sup> When Austin went to visit town officials to make an appeal, he was greeted with a barrage of threats and accusations of illegality (in relation to caring for orphans). He also said he knew, so long as he humbly received the telling off, that the threats would not be carried out: “I know enough about China to keep quiet and be humble.”<sup>82</sup> Eventually, the whole issue about the land use “just went away.”<sup>83</sup>

Conversely, the homes report that there are also times that visiting officials express approval of these unregulated operations. This can be implied (through not following through with threats) or expressed. For example, New Grace had an incident when village officials arrived for an unannounced visit to require all nannies at the home pass an exam to become qualified caregivers. When David expressed skepticism that his employees, most of whom are also farmers, would have time to study for the exam, he was given an answer sheet to distribute to the candidates.<sup>84</sup>

More astute and experienced foster home operators are extremely adept at playing by the rules and negotiating the “game” at the local level, to the point where they may be comfortable calling the government’s bluff when threatened. For example, Will Peters of China Orphan Relief spoke extensively of his strategies for negotiating with state officials:

When you talk about the Chinese government, what does that mean? The government is a big, huge statement. You can be in one office and say “they [another department] said I could do this”—you’re deliberately setting up a rivalry. So, our tactic is to threaten to split the different bureaus against each other . . . It boils down to a very serious game of poker. I make threats, and they have to decide whether I am bluffing or not and whether calling my

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<sup>81</sup> Interview with David, Founder/Director, New Grace, in Beijing, China (Sept. 17, 2009).

<sup>82</sup> Interview with Austin, Lawyer, New Grace, in Beijing, China (Sept. 5, 2009).

<sup>83</sup> Interview with David, Founder/Director, New Grace, in Beijing, China (Sept. 17, 2009).

<sup>84</sup> *Id.*

bluff is worth the risk . . . it's not pleasant, but it's for a good cause and even they know it.<sup>85</sup>

When China Orphan Relief began to experience similar pressure to the Dongjian homes to relocate, Will's response was neither to lie low nor move:

They clearly didn't think they had the political might to shut us down, but they told us we had to move, listing a litany of violations. My response was this: "Everything you said is true. You can decide to try to make me move. We all know that if you do that, your supervisors will find out. And you don't know who I know in the Beijing government. So, there is a risk to you. For me to ignore you is also a risk. We have to work something out. I'm doing a good thing for China. How can we do this so none of us loses?"<sup>86</sup>

Austin, New Grace's Chinese lawyer, expressed similar ideas, including the need to allow but also create opportunities for local officials to scold and berate, in order to "give face," accrue social capital and be able to push boundaries further in the future. He explained the game as follows:

It's an art, a very difficult art. It depends on a few factors in my view. First, it depends on who you know. Second, whatever you want to ask him to do must be permissible or encouraged. To ask someone to bend the rules for you is harder, because they have to expend their social or political capital. Third, there should be some benefit to them—can you do a favor to him in return, help out his family somehow. If it is something which can help him in his job, he'll be more likely to help. And the fourth factor is

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<sup>85</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009).

<sup>86</sup> *Id.*



whether you are critical of the government, or in any way negative against the government.<sup>87</sup>

Some interviewees were clearly capable of taking advantage of opportunities to build on such trust and rapport with local officials, with beneficial outcomes for their children. For example, China Orphan Relief has occasionally been able to have a child's *hukou*<sup>88</sup> record of birth date or birth place amended to increase adoption prospects: "Over time, you play on this trust and ask them to take new risks—a new type of trust develops, and a tighter bond."<sup>89</sup> Other areas where the foster homes felt comfortable pushing for further leeway and "closed eyes" were in relation to soliciting donations in China (which is illegal for unregistered charities), taxation rates, and administrative laws relating to land use.

#### IV. OPERATIONAL CONSEQUENCES OF THE "ONE EYE OPEN" APPROACH TO FOREIGN FOSTER HOMES

The case study homes varied greatly in terms of concern about operating without formal recognition or legal status. As noted above, only about half had investigated the possibility of formal NGO registration. Some interviewees expressed concern that legalization and the attendant formal government oversight would hinder their independence. However, as introduced in this section, most of the homes had encountered various practical challenges stemming from their lack of charitable, or in some cases any, legal status in China.

##### 1. Capacity

One consequence of lacking legal status, raised by numerous interviewees, is that operators must transact leases, banking, and employment in their personal capacity. This often results in sub-standard banking and employment practices and exposes signatories to a legal liability, a cause for concern for many of the

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<sup>87</sup> Interview with Austin, Lawyer, New Grace, in Beijing, China (July 7, 2010).

<sup>88</sup> See generally Tiejun Cheng & Mark Selden, *The Origins and Social Consequences of China's Hukou System*, 139 CHINA Q. 644 (1994) (referring to *hukou* as an individual's residency permit under the Chinese Household Registration System).

<sup>89</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009).

interviewees—"It is problematic, but what can we do? I have no idea how it might affect me";<sup>90</sup> "were an accident or something to happen, then we don't have any protection."<sup>91</sup> Loving Embrace, which employs families in the community as primary caregivers rather than hired staff, acknowledged that this vulnerability extends to those volunteers; many potential foster families have declined to volunteer with Loving Embrace due to concerns about liability in the event of an accident.<sup>92</sup> For foreigners, there is an associated risk of being asked to leave China.

In terms of employment, the majority of interviewees employ staff (in some cases up to several hundred employees) by way of verbal agreement, or a simple written contract signed by an individual as employer in his or her personal capacity. This makes it impossible to purchase social insurance for employees,<sup>93</sup> which is problematic in rural areas where employees are unable to self-insure.<sup>94</sup> Such informal arrangements also mean that employees are not protected by the Labor Bureau's oversight. Instead, as China Orphan Relief explained, they are reliant on their employer's goodwill: "What made it all work was trust—they trusted me—that I would treat them well and do the right thing. This trust was built up over time, and especially through middle management. [Middle management] trusted me, and this was passed down."<sup>95</sup>

## 2. *Financial Practices*

Banking restrictions cause significant obstacles for all of the foster homes interviewed. Those operating as non-entities are unable to open bank accounts in the name of the foster home,

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<sup>90</sup> Interview with Founder/Director, BICR, in Beijing, China (Aug. 27, 2009).

<sup>91</sup> Interview with Co-founders/Managers, Mercy Home, in Beijing, China (July 25, 2010).

<sup>92</sup> Interview with Co-founders/Directors, Loving Embrace, in Shanghai, China (Oct. 8, 2009).

<sup>93</sup> The Labor Contract Law covers only employers that are "enterprises, individual economic organizations, private non-enterprise entities, or other organizations." *Laodong Hetong Fa* (劳动合同法) [Labor Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective January 1, 2008), art. 2, *translated in* <http://www1.lawinfochina.com/display.aspx?lib=law&id=6133> [<https://perma.cc/P8YC-4YC6>].

<sup>94</sup> Interview with Will Peters, *supra* note 44; Interview with Alana, *supra* note 49; Interview with Alain, *supra* note 78.

<sup>95</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009).

meaning that unrelated personal bank accounts must be used to receive donations. This can cause transparency issues for international donors, who may feel uneasy about donating large sums of money to a personal account. For Shooting Star, this was the main issue that prompted it to seek Foundation status. As Shooting Star's lawyer put it, the willingness of offshore donors to support the organization's work depended entirely on its founder's social capital, and "it would be very difficult for new charities to do what [she] did."<sup>96</sup> Those homes using commercial representative office status are able to open accounts, but these are of limited utility as representative office bank accounts can only receive funds transferred from the bank account of the representative office parent company (which, as explained above, must be a commercial rather than a charitable foreign entity, although this rule has only recently begun to be enforced).<sup>97</sup> Donations received domestically, or from a donor unable to donate to the jurisdiction of the parent company, must be channeled through a personal bank account, raising the same issues as for non-entities.<sup>98</sup> Further, there are various daily and annual caps on personal bank account withdrawals; accordingly, many of the homes are forced to use multiple bank accounts, which have been opened by volunteers or friends for the purpose of channeling large operational budgets. The use of personal accounts can also cause taxation and accounting difficulties for charities in other countries that collect donations to be channeled to China<sup>99</sup> and erode the home's legitimacy in the eyes of the state and potential donors: "We've been told finances are the most important thing, our vulnerability—we are scrupulous about keeping receipts and books, as if we are ever in trouble, that would be the first thing requested;"<sup>100</sup> "we are operating way below the international financial ethics standards. So, it's difficult to raise money in

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<sup>96</sup> Interview with Anthony, Legal Counsel, Shooting Star, in Beijing, China (Sept. 4, 2009).

<sup>97</sup> Interview with Alain, *supra* note 14; Interview with David, *supra* note 81; Interview with Will Peters, *supra* note 44.

<sup>98</sup> Interview with David, Founder/Director, New Grace, in Beijing, China (Sept. 17, 2009).

<sup>99</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009).

<sup>100</sup> Interview with Co-founders/Directors, Loving Embrace, in Shanghai, China (Oct. 8, 2009).

China . . . We don't like it, of course, but we don't have a choice."<sup>101</sup>

Turning to taxation, most interviewees had difficulties understanding their liabilities under Chinese law. An obvious advantage to operating as a non-entity is that no taxes are payable, in other words "it keeps us out of the tax spotlight."<sup>102</sup> The same is true of registered Foundations, which under general tax laws are "virtually tax exempt."<sup>103</sup> Commercial representative offices, on the other hand, are subject to local taxes on expenditure,<sup>104</sup> although some of the commercially registered homes have successfully negotiated with their local tax offices for reduced rates or exemption, based on the charitable nature of their work. Ashley and He point out that such negotiations entail risks, by "[drawing] into question the propriety of the organization's registration as a commercial

<sup>101</sup> Interview with Alain, Founder, Good News Training Centre, in Hebei, China (Aug. 20, 2010).

<sup>102</sup> Interview with Co-founders/Directors, Compassion, in Dongjian, China (Sep. 1, 2009).

<sup>103</sup> Ashley & He, *supra* note 30, at 50. The law relating to Representative Offices of foreign NGOs is complex, but according to a 1996 policy issued by the State Administration of Taxation, non-profit institutions may apply for duty-free treatment. Guojia Shuiwu Zongju Guanyu Jiaqiang Waiguo Qiye Changzhu Daibiao Jigou Shuishou Zhengguan Youguan Wenti de Tongzhi (国家税务总局关于加强外国企业常驻代表机构税收征管有关问题的通知) [State Administration Notice of Taxation on Strengthening the Tax Management of Representative Offices of Foreign Enterprises] (issued by the St. Admin. of Tax., Sept. 13, 1996, effective Sept. 13, 1996) Guo Shui Fa (1996) No. 165, *translated in* <http://en.pkulaw.cn/display.aspx?cgid=16516&lib=law> [<https://perma.cc/KA2E-BZST>]. For example, in 2004 the (central) State Administration of Taxation approved exemption for thirty-three permanent Representative Offices of foreign enterprises, including the Ford Foundation and U.K. Care for Children Ltd. following applications to the Beijing Local Taxation Bureau. Guojia Shuiwu Zongju Guanyu Meiguo Fute Jijinhui Beijing Banshi Chudeng 33 Jia Waiguo Qiye Changzhu Daibiao Jigou Mianshui Wenti de Pifu (国家税务总局关于美国福特基金会北京办事处等 33 家外国企业常驻代表机构免税问题的批复) [Reply of State Administration of Taxation on Tax Exemption of 33 Permanent Representative Offices of Foreign Enterprises, such as Beijing Representative Office of Ford Foundation] (issued by the St. Admin. of Tax., June 11, 2004, effective June 11, 2004) Guo Shui Han (2004) No. 777, *translated in* <http://en.pkulaw.cn/display.aspx?cgid=55391&lib=law> [<https://perma.cc/P973-BQW9>]. The process of securing such tax exemption can be described as "opaque." Ashley & He, *supra* note 30, at 75.

<sup>104</sup> Zhonghua Renmin Gongheguo Guowuyuan Guanyu Guanli Waiguo Qiye Changzhu Daibiao Jigou De Zanzing Guiding (中华人民共和国国务院关于管理外国企业常驻代表机构的暂行规定) [Interim Provisions of the State Council of the People's Republic of China on Administration of Resident Representative Offices of Foreign Enterprises] (promulgated by the St. Council, Oct. 30, 1980, effective Oct. 30, 1980), art. 9 (China).

enterprise in the first place.”<sup>105</sup> Given the informal nature of these negotiations, New Grace also expressed concern that the taxation authorities could potentially decide in the future to demand payment of back-taxes, a bill that could potentially amount to millions of Chinese RMB due to New Grace’s large operating budget.

### 3. *Transparency and Good Governance*

There are numerous safeguards in Chinese law against substandard NGO practices, such as internal governance and financial management standards, annual MCA inspections, and information disclosure requirements.<sup>106</sup> However, these safeguards do not apply to unregistered or commercially registered organizations, such as the foreign foster homes. Generally, the foster homes have excellent administrative capabilities, and all were able to explain in detail good governance practices aimed at fulfilling a self-imposed and self-regulated duty of accountability towards donors and supporters. Many expressed concerns that changing the status quo and being more closely associated with government would impinge on the freedom they currently experience outside of the formal NGO legal framework. However, David Dale of New Grace was an exception:

The danger is there’s no defined system or standard of care, even in the state orphanages. So, you end up with everyone doing what everyone thinks is right or best. And you have to ask yourself—are we really caring for the children well enough? I think we are.

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<sup>105</sup> Ashley and He, *supra* note 30, at 59.

<sup>106</sup> See, e.g., Jijinhui Niandu Jiancha Banfa (基金会年度检查办法) [Measures for Annual Inspection of Foundations] (promulgated by the Ministry of Civil Affairs) (promulgated by the Ministry of Civil Affairs, Jan. 12, 2006, effective Jan. 12, 2006) (China); Jijinhui Xinxi Gongbu Banfa (基金会信息公开办法) [Measures for the Information Disclosure of Foundations] (promulgated by the Ministry of Civil Affairs MCA, Jan. 12, 2006, effective Jan. 12, 2006) (China); Cishan Fa (慈善法) [Charity Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2016, effective, Sept. 1, 2016), *translated in* <http://en.pkulaw.cn/display.aspx?id=21807&lib=law> [<https://perma.cc/D7SD-K4Y8>].

But that's just our judgment. That judgment should really be made by government, not us.<sup>107</sup>

The potential for deviant cases is an unavoidable risk of allowing unregulated care to flourish—although admittedly not one that is necessarily mitigated by increased government supervisory powers.

#### 4. *Legality for Legality's Sake*

Finally, many of the interviewees spoke of “legality” as something that would not only be pragmatically helpful, but also as something ideologically valuable, of intrinsic or perhaps moral worth. Despite being used to the contradiction in China between formal and informal rules, and fairly comfortable operating in what they refer to as a “grey area” between lawful and unlawful, tolerated and not tolerated, many interviewees still regarded “legal” as a status to be aspired to, and seemed to perceive a connection between law, justice and morality. On the other hand, the foster homes were also very frank in describing their work in general as “illegal” and open about the loopholes and back doors they need to use in order to be able to circumvent legal restrictions. Lawfulness was generally seen as worth pursuing but only insofar as its pursuit does not conflict with the higher moral norm that sick children must be cared for no matter the legal restrictions on doing so: “We’re all doing this work illegally. We can’t think of legalities, because if we do, the children would have died . . . We do understand, we know we *can’t* do this legally, but morally we *have* to do it;”<sup>108</sup> “we love the children. The children are my work. Government stuff is not my concern . . . Legal or not legal is fine for me;”<sup>109</sup> “we know our cause is worthwhile, so we’re willing to act illegally.”<sup>110</sup>

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<sup>107</sup> Interview with David, Founder/Director, New Grace, in Beijing, China (Sep. 17, 2009).

<sup>108</sup> Interview with Volunteer Coordinator, Rice Rescue, in Anhui, China (Oct. 4, 2009).

<sup>109</sup> Interview with Founder, Friendship Outreach, in Dongjian, China (Aug. 28, 2009).

<sup>110</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009).

## V. DISCUSSION: IMPLICATIONS FOR CHINA'S "LONELY CHILDREN"

### 1. *The "Chilling Effect"—Lack of Advocacy*

It is difficult to assess the impact of the negotiated, extra-legal regulation of the foreign foster home sector. On the one hand, the homes have collectively been able to provide high quality care and improved adoption prospects for many thousands of vulnerable children in China, and many are involved in impactful adoption advocacy in "receiving" countries, such as the United States. On the other hand, the willingness and capacity of foreign actors to try to influence state law and policy within China on issues such as abandonment, quality of institutional care and adoption seems to have been stifled by their lack of legal security. This "chilling effect" of ambiguous regulatory policy has been described aptly by Ashley and He in relation to unregistered NGOs more generally:

[T]he ambiguous legal status and resultant irregularities stemming from these organizations' ad hoc arrangements serves as an effective governmental tool to keep organizations in check in certain respects—namely, it keeps them in fear of the government's selective enforcement of registration, accounting and other requirements that they are forced to bend . . . Knowledge of their own vulnerability . . . in turn makes NGOs hesitant to wade into questionable political waters. Ambiguity creates a chilling effect—a cheap and powerful regulatory tool.<sup>111</sup>

The prevailing strategy of foreigners involved in foster care is to lie low and not risk incurring the ire of the state by drawing attention to shortcomings in Chinese child welfare or the more general issue of child abandonment (a phenomenon the Chinese government has a vested interest in underemphasizing due to its

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<sup>111</sup> Ashley & He, *supra* note 30, at 80.

nexus with controversial birth planning policies).<sup>112</sup> For example, there is a notable lack of collaboration among the homes or between the homes and state agencies in terms of advocacy for reforms to child welfare policies, legalization of foreign foster homes, or upstream measures aimed at preventing abandonment. It is also notable that this group of charities, despite being dominated by religiously motivated individuals and organizations, on the whole avoids a politicized evangelical agenda.

Whether or not this trend of self-censorship and lack of momentum in terms of advocacy is an intended or incidental effect of the (informal) norms and relationships in the field, the result is a social sphere in which any expansion, growth or impact on other spheres—such as policy, cultural attitudes to charity and the disabled, and religious/foreign-driven mission—is cautious at best. This feature is noted by researchers in relation to grassroots NGOs more generally. Lu's fieldwork on Chinese NGOs found "widespread pessimism (or realism) about what they can achieve through their actions;"<sup>113</sup> Ashley and He similarly argue that "one defines one's goals within the limits of what seems possible" and that "legal ambiguity combined with China's political climate seems to have shaped the overall agenda of China's grassroots NGOs to favor politically safe fields and politically prudent approaches."<sup>114</sup> For foreign foster home operators, this prudence takes the form of an overwhelming emphasis on service rather than advocacy, and a lack of mutually supportive networks with defined policy agendas within the sector.

## 2. *The "Axe Over the Head"—Challenges for Growth and Continuity*

Whether this regulatory landscape has been deliberately shaped or not, it allows China to maintain the fiction that only China cares for Chinese children, while also allowing private organizations to assist in orphan relief, a task in which local governments are

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<sup>112</sup> See generally KAY ANN JOHNSON, CHINA'S HIDDEN CHILDREN: ABANDONMENT, ADOPTION, AND THE HUMAN COSTS OF THE ONE-CHILD POLICY (2016) (describing the negative impact of China's one-child policy on Chinese families).

<sup>113</sup> Yiyi Lu, *NGOs in China: Development Dynamics and Challenges*, in CHINA'S OPENING SOCIETY: THE NON-STATE SECTOR AND GOVERNANCE 89, 98 (Zheng Yongning & Joseph Fewsmith eds., 2008).

<sup>114</sup> Ashley & He, *supra* note 30, at 83.



apparently overwhelmed. Further, such private charities can be unofficially but closely monitored and controlled by the shadow of state power and formal law. Will Peters described it thus: "The government wants to have its cake and eat it too—it wants to let NGOs function in China, without legitimizing them, but while keeping control over them. They are walking a tightrope."<sup>115</sup> The lawyer for Shooting Star hypothesized that the "one eye open, one eye closed" approach is "sort of part of the policy-making process in China—a new trend emerges in practice, which is beyond the law—the government allows them to do it, to see how it goes. If it goes well, then they adopt it by writing it into law."<sup>116</sup> Austin of New Grace similarly characterized the ambiguity of the field as intentional, at least at the local level. He explained the government approach to private foster homes using the analogy of a parent adopting a curfew but consistently allowing their teenager to arrive home slightly past the set time but within reason, according to an unspoken flexibility. But "it's very sensitive. They don't want to be *seen* as doing that."<sup>117</sup> The director of Good News similarly speculated, in reference to local orphanage officials: "They are O.K. with being in the gray—it gives them the control to go either way."<sup>118</sup> This viewpoint echoes that of Liu, who in reference to the regulation of Chinese charities generally finds that:

[D]ue to institutional reasons, many activities which should be carried out according to legally prescribed rules are instead carried out according to some underlying "hidden" rules. Gradually these hidden rules replace the legally prescribed rules to become commonly accepted rules, thereby further twisting the already problematic system, and increasing the difficulties in institutional reform and standardization of social administration.<sup>119</sup>

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<sup>115</sup> Interview with Will Peters, founder/CEO of China Orphan Relief, in Beijing (Aug. 25, 2009).

<sup>116</sup> Interview with Anthony, Legal Counsel, Shooting Star, in Beijing, China (Sept. 4, 2009).

<sup>117</sup> Interview with Austin, Lawyer, New Grace, in Beijing, China (Sept. 5, 2009).

<sup>118</sup> Interview with Alain, Founder, Good News Training Centre, in Hebei, China (Aug. 24, 2009).

<sup>119</sup> Liu, *supra* note 22, at 89.

The hidden rules that characterize state-society relations in the field have significant ramifications for the growth of the sector. It seems that so long as those rules are respected, much can be achieved outside the legal framework. As Keyser points out, although the ambiguous legality of foreign NGOs causes difficulties, “the very vagueness in the law on the protection of children as well as the ability to operate at the local level has also created opportunities.”<sup>120</sup> Established foster homes, whose operators are astute to the political climate in which they work and have built up a network of protective connections and experience over many years, are able to take advantage of the flexible regulatory environment to carry out work that benefits thousands of children.

However, both political acumen and a strong personal motivation are needed to persevere in the face of the many operational hurdles, discussed above, facing the quasi-legal foster homes: “There’s an intangible hassle factor—we have to dance around all these hoops. It’s a quiet sucking away of energy.”<sup>121</sup> Further, interviewees were also aware of their vulnerability to unforeseen changes and events (“local attitudes to enforcement vary as suits their local needs”)<sup>122</sup> and at times expressed frustration with the vague, capricious and negotiated nature of their interactions with the state: “I live between lines that are moving constantly—it’s a moving target. What is acceptable one day is not O.K. the next. You don’t know where the line is so it’s easy to cross it.”<sup>123</sup> Even Austin, who described the social rules as “predictable to an extent. They’re based on past practice,” on the other hand also admitted that “there is no guarantee that [practice] will continue like that. . . . It’s grace and favor, it’s not law.”<sup>124</sup> The interviewees were all very aware, when pushed on the sustainability of their work, of their overall vulnerability to being shut down at any time without notice should circumstances change, something described as a constant “axe over the head,” stating: “All of us could be stopped at any time

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<sup>120</sup> Keyser, *supra* note 6, at 62.

<sup>121</sup> Interview with CEO, Prince of Peace, in Meihua, China (Sep. 1, 2009).

<sup>122</sup> Interview with Anthony, Legal Counsel, Shooting Star, in Beijing, China (Sept. 4, 2009).

<sup>123</sup> Interview with Alana, Founder/Director, Red Thread, in Shaanxi, China (Sep. 27, 2009).

<sup>124</sup> Interview with Austin, Lawyer, New Grace, in Beijing, China (Sep. 5, 2009).

from doing what we're doing,"<sup>125</sup> "registration would mean we could work more smoothly and feel safer if the officials we deal with are replaced by people with different ideas."<sup>126</sup> Some have intentionally adopted a transient model of care with this in mind, and Prince of Peace and Mustard Seed are both pursuing a long-term strategy of handover to Chinese leadership. In all, there was a prevailing sense that vulnerability is an inevitable aspect of working in a contentious and unregulated field; foreigners in the field understand that their work is tolerated and permitted for the time being, within fairly narrow parameters, but generally put much more confidence in divine protection ("We trust God. Sometimes there's not an earthly explanation, there just isn't")<sup>127</sup> than in the predictability of the Chinese state:

This is the most frustrating feeling in China—you're never one hundred percent safe or on solid ground. This project, it's big, it's good, we've put so much into it. But in a week they could bring us down. But that's also the beauty of China! Nothing is radical here. There's always room for negotiating.<sup>128</sup>

## VI. CONCLUSION

"Most of what we've accomplished could never have been done in our home country. And ten years from now it may be impossible because the government is just beginning to understand its responsibility to control NGOs."<sup>129</sup>

This study has contributed to our understanding of state-society relations in China's non-profit sector, demonstrating various and overlapping modes of interaction with state authorities that

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<sup>125</sup> Interview with Co-founders/Directors, Loving Embrace, in Shanghai, China (Oct. 8, 2009).

<sup>126</sup> Interview with Co-founders/Directors, Mothers' Arms, in Shanghai, China (Oct. 8, 2009).

<sup>127</sup> Interview with Co-managers, Prince of Peace, in Meihua, China (July 29, 2010).

<sup>128</sup> Interview with Alain, Founder, Good News Training Centre, in Hebei, China (Aug. 24, 2009).

<sup>129</sup> Interview with Co-founders/Directors, Loving Embrace, in Shanghai, China (Oct. 8, 2009).

range from symbiotic relationships of mutuality to examples of repression and antagonism. These processes, of circumventing or coping with state disapprobation, or negotiating state tolerance or support, were overwhelmingly occurring with lower level officials, and usually evolving at a very gradual rate towards greater security and openness over long periods of time. Generally, to use an analogy raised by one interviewee in the broader study, the homes were gradually trending over many years from “red” to “yellow” to “green” in terms of permissibility. Only a small number of homes have attained a formal “green light,”<sup>130</sup> and all of these reached such formalization only after many years of operating in the “red” or “yellow” zones. Where such formal recognition was present, interaction with the state was generally occurring at a more senior level of government bureaucracy. Those who have endured in the field are astute and sensitive to the different pressures and considerations at play on the part of the state. They are careful to avoid certain behaviors, most notably anything that could raise red flags in the eyes of the state about evangelistic intentions or loss of face. They have a clear understanding of which lines must not be crossed and which lines can be pushed and manipulated over time. They have adapted to a system in which flexible norms, rather than formal laws, govern individualized, paternalistic relations with the local state, and in which social and political legitimacy carries more weight than legality.

Foster home operators are also balancing their mission and calling with state restrictions: “I’ll do this until you shut me down or don’t let me do it the way I want to do it . . . I want to look after children, and I’m happy to play by the rules, spoken and unspoken, as long as it suits me.”<sup>131</sup> Those state restrictions look likely to increase with the passing of the new Foreign NGO Management Law, effective January 1, 2017.<sup>132</sup> The law requires overseas NGOs that are active in China (this would include U.S.-registered charities and foundations that fund projects in China) to find an official Chinese sponsor and register with the Ministry of Public Security.<sup>133</sup>

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<sup>130</sup> See *supra* note 32 and accompanying text.

<sup>131</sup> Interview with Will Peters, Founder/CEO, China Orphan Relief, in Beijing, China (Aug. 25, 2009).

<sup>132</sup> Foreign NGO Management Law, *supra* note 29. See generally, Wong, *supra* note 29 (describing increased legal restrictions on foreign organizations operating in China).

<sup>133</sup> Foreign NGO Management Law, *supra* note 29, art. 6, 11.

It also gives the police broad search, seizure, and detention powers over organizations that receive foreign funding.<sup>134</sup> Given that most of the foreign foster homes are dependent on donations channeled through foreign charities, the law appears to formalize police oversight of the sector. Perhaps more worrying is the underlying spirit of the law, which indicates winds of deep skepticism and suspicion towards foreign civil society are once again blowing from Beijing.<sup>135</sup> The tension previously noted by Keyser, as to how and when foreign non-profits can be registered in China,<sup>136</sup> seems to have been resolved, at least on paper, in favor of authoritarian restrictions and high hurdles to foreign non-profit activity. It seems likely that in this newly emerging political climate, the proven ability of foreigners in the foster home field to navigate shifting norms and cultivate social and political legitimacy in the face of restrictive formal laws, will be more important than ever to their survival and to the fate of China's lonely children.

## VII. APPENDIX A: PROFILE OF INTERVIEWEES

Participants from a total of twenty-four different grassroots/non-state orphan care providers were interviewed as part of the broader research project. These providers are roughly categorized in Table 1.

**Table 1. Orphan-Related NGOs by Activity**

Description	No. of Interviewees
Chinese-run orphanage	7
Chinese-run orphanage support organization	1
Chinese-run foster home	2
Foreign-run foster home	14
<b>Total</b>	<b>24</b>

<sup>134</sup> *Id.* ch. V, VI.

<sup>135</sup> Wong, *supra* note 29.

<sup>136</sup> Keyser, *supra* note 6 and accompanying text.

Interviews were also conducted with a number of child-related NGOs, both foreign and Chinese, with primary content covering NGO laws, policies and practice, registration procedures, and issues relating to Chinese civil society more generally; a retired senior level Ministry of Civil Affairs<sup>137</sup> official; and the following government and government-owned departments and entities: the Ministry of Civil Affairs China Charity and Donation Information Center,<sup>138</sup> the Shandong Charity Federation Office,<sup>139</sup> and the Ministry of Civil Affairs NGO Service Center.<sup>140</sup>

### VIII. APPENDIX B: METHODOLOGY NOTES

In conducting interviews and undertaking data analysis, I adopted the method for socio-legal studies set out by Professor Denis Galligan in *Law in Modern Society*, and in particular the first three of the four methodological principles, which are described as follows:

[F]irst identifying and describing features of a legal order that can be identified as relevant to the actions of citizens and officials, . . . secondly, examining the meanings attributed to such features by citizens and officials, and the actions that follow . . . [thirdly,] focusing on the character of social spheres and their interaction with law[, fourthly,] positioning law in a moral context [and connecting it to] its pragmatic foundations.<sup>141</sup>

When it comes to mapping the relevant features of the field of study, a number of issues were faced. First, using networks and

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<sup>137</sup> The Ministry of Civil Affairs (*Zhonghua Renmin Gongheguo Minzheng Bu*) is the administrative authority responsible, *inter alia*, for welfare programs.

<sup>138</sup> Interview with Zhonghua Renmin Gongheguo Minzhengbu Zhongmin Cishan Juanzhu Xiaoxi Zhongxin (中华人民共和国民政部中民慈善捐助消息中心) [Ministry of Civil Affairs China Charity and Donation Information Center], in Beijing, China (Sept. 8, 2009) (on file with author).

<sup>139</sup> Interview with Shandong Sheng Cishan Zonghui (山东省慈善总会) [Shandong Charity Federation Office], in Jinan, Shandong Province, China (Sept. 21, 2009).

<sup>140</sup> Telephone interview with Zhonghua Renmin Gongheguo Minzhengbu Minjian Zuzhi Fuwu Zhongxin (中华人民共和国民政部民间组织服务中心) [Ministry of Civil Affairs NGO Service Center] (Sept. 18, 2009).

<sup>141</sup> DENIS GALLIGAN, *LAW IN MODERN SOCIETY* 34–38 (2007).

word of mouth to contact interviewees leads to a set of case studies more likely to constitute a social network, and, from a positive science perspective, less representative of all actors involved in private orphan work. However, Small argues that, beyond the often-overlooked point that even supposedly “random” samples are almost inevitably characterized by bias problems, “bias” is the wrong term or standard of assessment when it comes to in-depth interviews. The set of cases, as a result of being “selected” based on personal contacts and informal introductions, will as a group have particular characteristics—the most obvious being their willingness to speak to me—but these are characteristics that, in the words of Small, “rather than being ‘controlled away’, should be understood, developed and incorporated into [one’s] understanding of the cases at hand.”<sup>142</sup>

The next set of factors are related. First, there are obvious difficulties faced by an ‘outsider’ seeking to observe and enquire about sensitive work being carried out on the margins of legality. Second, given the opacity of government policy and practice in relation to such a sphere of activity, the bulk of ethnographic data collected is necessarily derived from interviews with private operators in the field rather than informants from the government. Given the intersection of up to three politically controversial aspects to my case studies—quasi-legal/unregistered, church-associated, orphan-directed charities—attempts to speak to local officials, or requests for my informants to put me in touch with such officials, were largely fruitless. Thus, the primary data presented herein emphasizes the civil, as opposed to state, perspective of law, order, and regulation in the field. Third, selecting which elements and observations to be used to construct a narrative of the field required “mastering the elements of the drama;” as Bates et al note, narrative, like dramas, “can be elusive; many possible explanations can exist, and many possible interpretations.”<sup>143</sup> These three factors are accommodated by the methodological framework within which the data was collected and analyzed. Rooted in socio-legal analysis, the theoretical task of an interpretive/reflexive, as compared to positivist approach, is to seek to uncover meanings and patterns in

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<sup>142</sup> Mario Luis Small, *How Many Cases Do I Need?: On Science and the Logic of Case Selection in Field-Based Research*, 10(1) ETHNOGRAPHY 5, 14 (2009).

<sup>143</sup> ROBERT BATES ET AL., *ANALYTIC NARRATIVES* 14 (1998).

the field of social activity by an exploratory interpretation of institutions and behaviors, rather than a descriptive measurement thereof. Thus, a “thick description,”<sup>144</sup> or narrative of a field of activity, can be constructed, and the questions of interest reflexively refined in the process. By seeking, in this way, to situate the field of social activity within its broader context, and having regard for the meanings constructed by those in the field itself, richer interpretations can be drawn, including as to government behavior and intention, and accounting for the impact of my presence as an observer and outsider in the field. These theoretical extrapolations benefit from a coping strategy I adopted very early on, when the opacity of activity in this realm became apparent, namely, to increase the number of field sites and thus reduce the impact of a lack of local bureaucratic cooperation in any particular site. Knowledge gained in particularly “data-rich” locations, such as Dongjian (an area previously home to dozens of foreign foster homes, and the “homeland” of China’s foreign foster home movement since the 1980s), informed and contextualized behaviors, norms, and relationships observable in other locations where informants were fewer or seemed to be less transparent about their work and experiences.<sup>145</sup>

This framework borrows extensively from the “extended case method” approach espoused by Michael Burawoy.<sup>146</sup> Burawoy characterizes his approach as a type of reflexive science, which “takes as its premise the inter-subjectivity of scientist and subject of study,” as compared to positive science which “works on the principle of the separation between scientists and the subjects they examine.”<sup>147</sup> The starting point of reflexive science is to admit that the impact of the researcher’s presence in the field, the personal preferences and interpretations which she brings to bear when selecting data, and the resultant ambiguous nature of such data reporting decisions, all violate positive science prescriptive tenets of, respectively, the injunction against reactivity, reliability, and

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<sup>144</sup> CLIFFORD GEERTZ, *INTERPRETATION OF CULTURES*, 5–6, 9–10 (1973).

<sup>145</sup> For a discussion of multi-site case studies, see Maria Heimer, *Field Sites, Research Design and Type of Findings*, in *DOING FIELDWORK IN CHINA* (Maria Heimer & Stig Thøgersen eds., 2006) (explaining the similarities and differences in a multi-site study).

<sup>146</sup> Michael Burawoy, *The Extended Case Method*, 16(1) *SOC. THEORY* 4 (1998); Small, *supra* note 142.

<sup>147</sup> Burawoy, *supra* note 146, at 4.



replicability. However, rather than seeking to artificially mitigate against such processes resulting from the researcher's presence, Burawoy seeks to include and account for such processes.

Thus, throughout my fieldwork, I remained mindful of the perturbations created by my presence and by the knowledge, on the part of informants, of my agenda, and have paid close attention to "non-discursive . . . unexplicated, tacit knowledge"<sup>148</sup> underlying my interactions in the field. For example, one "positive perturbation" existed on account of my having a religious background and beliefs in common with almost all interviewees, discussions about which would regularly led to noticeable openness on the part of my informants. Such discussions also often led to more expansive discourse about other "laws" and normative forces, felt and acted upon by them, but which would not have been immediately obvious from a secular or rational-legal perspective. On the other hand, in some interviews I felt that I was received primarily as a Westerner and outsider, which resulted in a corresponding non-discursive posture, on the part of Chinese interviewees, of defensiveness or impenetrability. By regarding and reflecting on the effect of such perturbations, I was better able to derive legitimate and defensible interpretations and analyses of my interviews and observations in the field.

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<sup>148</sup> Burawoy, *supra* note 146, at 4.